IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 530 OF 2004

The Brihan Maharashtra Sugar]
Syndicate,a Company incorporated]
under the Companies Act, 1956,]
having its registered office at]
Village Gande Dumbala, Taluka]
Igatpuri, District Nashik]..Appellants

versus

1. Meher Distilleries Pvt. Ltd]
a company incorporated under the]
Indian Companies Act, 1956,]
having its registered office at]
Old Chinoy Building, 275-E,]
Tardeo Road, Mumbai and its]
factory at Village Aswa,]
Taluka Dahanu, Dist : Thane]
through its C.A. Shri Sanjay]
Dattatrey Ahire]
2. M/s. Raymon Wines, the sol]
proprietary concern of]
Ms. Fiorza K. Engineer, having]
its office at 6th Mile,]
Belagaon Dhaga, Nasik Trimbak]
Road, Nasik 422213 through its]
C.A. Shri Kaushesh Ramkripal]

Yadav]
3. Chinoy Holdings Pvt. Ltd.]
a company incorporated under the]
Indian Companies Act, 1956,]
having its registered office at]
6.2 Spenta House, Gibbs Road,]
Malabar Hill, Mumbai 400 006]..Respondents
through its C.A. Sri Sailesh]
Desai]

Mr. H. W. Kane with Mr. Vivek Walawalkar with H. J. Engineer i/b. M/s. Gordhandas & Fozdar for the Appellants.
Mr. Rahul Chitnis for the Respondents.

CORAM : D. G. DESHPANDE,J.
DATE : 21ST SEPTEMBER,2005

ORAL JUDGMENT :

1. Heard Counsel for the Appellants and the Respondents.

2. This Appeal was admitted on 27.4.2004 and hearing was expedited looking to the issue involved. Appellants are the original Defendants and Respondents are original Plaintiffs. Plaintiffs filed a suit before the Additional District Judge, Palghar, complaining of infringement of the Copy Right or infringement of rights conferred under The

Copy Right Act, 1957, (hereinafter referred to as "the said Act"). With reference to Section 62 of the said Act, dispute is about the labels on the liquor bottles. Colour copies of the said liquor bottles, infringement of which was complained, were tendered by the Counsel for the Appellants. It is at Exhibit 12A. The label of the plaintiffs as well as the label of the defendants - appellants is shown there. It was the case of the plaintiffs that they are the owners of copyright in artistic work in label "Prince Santra" which is shown in Exhibit 12A and I have marked it as L-1 for easy reference. L-2 is the label used by the defendants as marked by me, under my initials.

3. The plaintiffs raised many contentions but the main contention is whether the plaintiffs are owners of the artistic work "Prince Santa" label L-1 and whether the defendants have copied the said label and committed infringement of the plaintiffs copyright. The defendants denied all the contentions of the plaintiffs. According to them, firstly, the plaintiffs are not the owner of the copyright in the artistic work of "Prince Santra", L-1. Secondly, there is absolutely no artistic work in L-1. Thirdly, on the face of it, both the labels are totally distinct and separate. There is nothing which can mislead the purchasers of country liquor

and a bare perusal and comparison of the two labels L-1 and L-2 is sufficient for any court to come to the same conclusion, but the trial court committed grave mistake and error in finding resemblance in the two labels and granting decree in favour of the Plaintiffs. Defendants - Appellants were restrained perpetually from infringing the copyright of the plaintiffs' original artistic work in the label Prince Santra, L-1 and they are also directed to deliver copies of label L-2 to the plaintiffs with dyes, drawings, packing material, promotional material etc. and, lastly, if the defendants failed to comply with the order, the Commissioner of State Prohibition and Excise, was given powers to implement this order. It is against this judgment and decree, that the present appeal is filed.

4. Counsel for the appellants, firstly, contended that any infringement of the copyright can be claimed only if there is a similarity. He relied upon Sections 13, 45, 48 of the said Act, and then contended that in the label of the plaintiffs L-1 there is absolutely no artistic work. He also contended that what was disputed was breach of any infringement of copyright and not a dispute about passing of. Exhibit 12A was given to me. He contended that Exhibit 12A which shows different labels of different companies regarding liquor made

from Santra and Orange and contended that since oranges are of orange colour, all the manufactures have used orange as the basis or background colour of their labels. There is a difference in the shed of orange only in respect of two labels from Exhibit 12-A. Those labels are all in Marathi. That difference is in respect of label of "Desi Daru Rethara", which is more yellowish than orange and another label "Desi Daru Santra" which is faint orange. Otherwise out of 9 labels, all the 7 other labels have used orange as a base colour on their labels. He also contended that the names of the product of the plaintiffs and the defendants were totally different. The plaintiffs product was named as "Prince Santra" and the defendants product was named as "No.1 Tango Santra". In the label of the plaintiffs there was a red border over the label, whereas in the label of the defendants it was a golden square border, other writings on both the labels was totally different in different fonts, shape, size. Therefore, according to him, the label L-1 and L-2, are totally fundamentally and basically different. In the label of the defendants there is absolutely no artistic work and therefore the plaintiffs were not entitled for any order in their favour, and on this visual comparison only, the claim and contention of the plaintiffs in the suit should have been rejected. Exhibit ’7 was also

given to me, which shows the plaintiffs label on the right side and defendants label on the left side.

5. Counsel for the appellants also contended that the plaintiffs have utterly failed to prove their ownership under the said Act in respect of L-1 because they did not examine the author or the artist who prepared their label L-1. He also contended that there is no evidence on record to show that the plaintiffs had purchased the artistic work. According to him and from the evidence, there was nothing with the plaintiffs to show that they had paid anything to the said artist for purchasing so-called artistic work nor the artist was examined in that regard. He also contended that the original work of art of L-1 was not produced before the court.

6. The next submission of the counsel for the appellants was about jurisdiction, He referred to Section 62, which reads as under :

> "62. **Jurisdiction of court over matters arising under this Chapter.-** (1) Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the district court having jurisdiction.
>
> (2) For the purpose of sub-section (1), a "district court having jurisdiction" shall, notwithstanding anything contained in the

> Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, include a district court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain."

He contended that this sub section (2) of Section 62 had over riding effect over the provisions of the Civil Procedure Code regarding jurisdiction and jurisdiction was conferred to the District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding..... or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain. He contended that none of the plaintiffs fulfil this criteria and therefore Palghar Court had no jurisdiction. He pointed out that the Plaintiff No.1 Meher Distilleries Pvt. Ltd. was not an exclusive licensee. Plaintiff No.2 was residing at Nashik. Plaintiff No.3 was residing in Mumbai, and therefore none of the persons were residing or carrying on business in Thane District. The contention of the plaintiff No.1 that they were having factory at Village Aswa, Tal : Dahanu, Dist : Thane, was totally wrong, because they were not the exclusive licensees of this copyright. My

attention was also drawn to Section 54 where the owner of the copyright has been mean to include an exclusive licensee as per Section 54(a).

7. On the other hand, Mr. Chitnis for the plaintiffs - respondents contended that there was no necessity to examine the artist who had prepared a label because there was no dispute of the plaintiffs that the artist or vice versa and the defendants have no concern with the artist in that event. He also contended that certificate of copyright was in favour of the plaintiffs under Section 48, which lays down that the Registrar of Copyrights shall be prima facie evidence and certificate shall be admissible without further proof of production of the original. He also contended that the infringement of the plaintiffs copyright was intellectually done to deceive public. He relied upon the judgment of the Madras High Court reported in **AIR 1961 Madras 111 C. Cunniah and Co. by partners M. Anjaneyulu and others vs. Balraj and Co. by partners S. Rajaratnam Chettiar and another.**

8. Regarding jurisdiction Mr. Chitnis contended that as to who should first institute the suit was not given in Section 62 relied upon by the appellants. According to Mr. Chitnis L-2 label of

the defendants is a direct infringement of the copy right of the plaintiffs and the trial court was justified in decreeing the suit. He therefore fully supported the judgment of the trial court.

9. Since both the parties referred to certain Sections of the said Act, I am reproducing Sections, viz. Sections 13, 45, 48, 55, 57 and 62 :

> "13. **Works in which copyright subsists.-** (1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,-
>
> (a) original literary, dramatic, musical and artistic works;
>
> (b) cinematograph films, and
>
> (c) [sound recording].
>
> (2) Copyright shall not subsist in any work specified in sub-section (1), other than a work to which the provisions of Section 40 or section 41 apply, unless,-
>
> (i) in the case of a published work, the work is first published in India, or where the work is first published outside India, the author is at the date of such publication, or in a case where the author was dead at that date, was at the time of his death, a citizen of India;
>
> (ii) in the case of an unpublished work other than [work of architecture], the author is at the date of the making of the work a citizen of India or domiciled in India; and
>
> (iii) in the case of [work of architecture], the work is located in India.
>
> Explanation.- In the case of a work of joint

authorship, the conditions conferring copyright specified in this sub-section shall be satisfied by all the authors of the work.

(3) Copyright shall not subsist-

(a) in any cinematograph film if a substantial part of the film is an infringement of the copyright in any other work;

(b) in any [sound recording] made in respect of a literary, dramatic or musical work, if in making the [sound recording], copyright in such work has been infringed.

(4) The copy right in a cinematograph film or a [sound recording] shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or, as the case may be, the [sound recording] is made.

(5) In the case of [work of architecture], copyright shall subsist only in the artistic character and design and shall not extend to processes or methods of construction."

"45. **Entries in register of Copyrights.-** (1) The author or publisher of, or the owner of or other person interested in the copyright in, any work may make an application in the prescribed form accompanied by the prescribed fee to the Registrar of Copyrights for entering particulars of the work in the Register of Copyrights:

[Provided that in respect of an artistic work which is used or is capable of being used in relation to any goods, the application shall include a statement to that effect and shall be accompanied by a certificate from the Registrar of Trade Marks referred to in Section 4 of The Trade and Merchandise Marks Act, 1958 (43 of 1958), to the effect that no trade mark identical with or deceptively similar to such artistic work has been registered under that Act in the name of, or that no application has been made under that Act for such registration by, any person other than the applicant.]

(2) On receipt of an application in respect of any work under sub-section (1), the Registrar of Copyrights may, after holding such inquiry as he may deem fit, enter the particulars of the work in the Registrar of Copyrights."

"48. **Register of Copyrights to be prima facie evidence of particulars entered therein.-** The Register of Copyrights shall be prima facie evidence of the particulars entered therein and documents purporting to be copies of any entries therein, or extracts therefrom certified by the Registrar of Copyrights and sealed with the seal of the Copyright Office shall be admissible in evidence in all courts without further proof or production of the original.

"55. **Civil remedies for infringement of copyright.-** (1) Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right:

Provided that if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for believing that copyright subsisted in the work, the plaintiff shall not be entitled to any remedy other than an injunction in respect of the infringement and a decree for the whole or part of the profits made by the defendant by the sale of the infringing copies as the court may in the circumstances deem reasonable.

(2) Where, in the case of a literary, dramatic, musical or artistic work, a name purporting to be that to the author or the publisher, as the case may be, appears on copies of the work published, or, in the case of an artistic work, appeared on the work when it was made, the person whose name so appears or appeared shall, in any proceeding in respect of infringement of copyright in such work, be presumed, unless the contrary is proved, to be the author or the publisher of the work, as the case may be.

(3) The costs of all parties in any proceedings in respect of the infringement of copyright shall be in the discretion of the court.

"57. **Author's special right.-** [(1) Independently of the author's copyright and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right -

(a) to claim authorship of the work; and

(b) to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation:

Provided that the author shall not have any right to restrain of claim damages in respect of any adaptation of a computer programme to which clause (aa) of sub section (1) of section 52 applies.

Explanation.- Failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the rights conferred by this section.]

(2) The right conferred upon an author of a work by sub-section (1), other than the right to claim authorship of the work, may be exercised by the legal representatives of the author.

"62. **Jurisdiction of court over matters arising under this Chapter.**- (1) Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the district court having jurisdiction.

(2) For the purpose of sub-section (1), a "district court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, include a district court within the local limits of whose jurisdiction, at the

> time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain."

To sum up the provisions of the aforesaid Sections, Section 13 is in respect of the works in which copyright subsists. Sub Section (1)(a) which was relied upon by both the Counsels is about literary, dramatic, musical and artistic works. According to the plaintiffs L-1 is the original artistic work or artistic work in respect of which the plaintiffs has a copyright and according to the defendants L-1 is not at all an artistic work, and, secondly, there is no copyright with the plaintiffs about the same. Thirdly, there is no infringement of copyright by the defendants because their label L-2 is totally different with not even 5% similarity, excepting the background colour of the label. Section 45, as seen above, is about entries in the Register of Copyrights. The Registrar is given power to make enquiry and enter the particulars of the work in the register of copyrights. Section 48 is giving prima facie value to the Registrar of copyrights and admissibility in evidence without further proof of production of original. Section 55 is about the civil remedy available for infringement of copyright. Then Section 57 speaks about the special right and residuary rights after assignment.

Section 62(2) is about jurisdiction of the courts over the matters.

10. Apart from the aforesaid Section Chapter XI of the said Act includes Section 51 which lays down the circumstances in which the copyright can be said to have been infringed or shall be deemed to have been infringed. Therefore, it is necessary to reproduce the said Section as under:

> "51. **When copyright infringed.-** Copyright in a work shall be deemed to be infringed -
>
> (a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a license so granted or of any condition imposed by a competent authority under this Act-
>
> (i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or
>
> (ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the pubic would be an infringement of copyright; or]
>
> (b) when any person-
>
> (i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or
>
> (ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or
>
> (iii) by way of trade exhibits in public, or

(iv) imports [****] into India,

any infringing copies of the work :

[Provided that nothing in sub-clause (iv) shall apply to the import of one copy of any work, for the private and domestic use of the importer.]

Explanation.- For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an "infringing copy."

11. In my opinion, the crucial question is not whether the plaintiffs have a copyright in the label L-1 but the question is whether L-2 is a infringement of the copyright of the plaintiffs because of similarity or artistic similarity and the answer has to be in the negative. No skill or expertise is required to come to this conclusion. The comparison and perusal of the two labels i.e. L-1 of the plaintiffs and L-2 of the defendants, is sufficient to come to these conclusions. Following are the specializations in respect of L-1 :

a) background of the label is orange.

b) there is a rectangular viz. round corner border in red.

c) the word "Desi Daru" is printed in black.

d) Words "Prince Santra" are printed in white.

e) the name of the dealers is printed in white and all other printed material is in black, and perhaps there is a photograph of orange at the centre or some mark in red.

So far as label L-2 is concerned, the following are the specializations:

a) the background is orange.

b) the border is golden orange - big square.

c) Word "Desi Daru" is printed in white.

d) the name of the product is totally different. It is "No. 1 Tango Santra", it is in golden square with soft round, name appears is in orange.

e) every other thing is printed in white.

Except the background in both the labels, which is orange, there is absolutely no similarity. By no stretch of imagination it can be said that label L-2 is the copy of label L-1. They are distinct and

separate. Distinction has been pointed out by me that is in respect of each and every aspect of the label excepting the background colour, and the most important thing is the name of the products are totally different with no similarity. Plaintiffs product is known as "Prince Santra" and Defendants product is known as "No.1 Tango Santra.

12. Now use of the orange colour by defendant No.2 as a background colour on their label, cannot be said to be infringement for two reasons, the use of orange colour for the label is not an artistic creation and in all other labels which are reproduced on Exhibit 12A of other manufactures of a country liquor have used colour orange as background colour, for their labels, therefore, in the label L-2 there is no infringement even to the extent of 5%, I have intentionally reproduced Section 51 as to when the copyright is to be infringed. The case of the plaintiffs does not fall in any of the categories. If the labels of the plaintiffs and that of the defendants i.e. L-1 and L-2 had some similarities or it was misleading, if L-2 was capable of being a copy of L-1, then the plaintiff could have succeeded in proving infringement. But not even 5% is the similarity between the two labels.

13. Secondly, even if the plaintiffs have a copyright about L-1, there is absolutely no artistic work in preparing L-1. Regarding any other piece of art, there could not be only many different opinions as to whether a particular work is an artistic work or not. But regarding L-1 it cannot be said that there is anything which can be said is an artistic work. Choosing orange as background colour in the label or putting red border cannot be called as an artistic work, no skill or specialization is required. Same is the case with printing name and other material on the label. Same is the case with the label of the defendant No.2. There is absolutely nothing in the said label L-1 which can be said to be an artistic work.

14. Therefore, when after comparison of the labels L-1 and L-2, any prudent man, as is required by the Evidence Act would come to the conclusion that there is absolutely no similarity between the two and L-2 cannot be considered or taken as a copy or reproduction of L-1, then it is not at all a case of infringement of copyright of the plaintiffs. In view of this conclusion, whether the plaintiffs is the owner of the particular mark or exclusive licensee and whether the Palghar Court had jurisdiction, becomes totally insignificant.

15. Mr. Chitnis relied upon judgment of Madras High Court, as referred above, in order to show that defendants label L-2 is a copy. Wherein in paragraph 7 word "copy" is referred to as under :

> **"A copy is that which comes so near to the original as to suggest that original to the mind of every person seeing it."**

This definition of the word "copy" completely falsifies the case of the plaintiffs. There is no resemblance whatsoever between the two labels excepting the background colour orange. In view of this matter, the judgment of the trial court is patently wrong. The findings of the trial court on vital issues Nos. 6, 7 and 8 are perverse, these findings are set aside. Issue Nos. 11, 12 and 13 are required to be held in favour of the Appellants - Defendants.

16. In view of this, appeal is allowed. judgment and decree of the trial court is set aside and the suit of the plaintiffs is dismissed with costs throughout.

21.9.2005 (D.G. DESHPANDE, J.)

After this order was pronounced, counsel for the Respondents prayed for stay of this order. Prayer for stay is rejected.

21.9.2005 (D.G. DESHPANDE, J.)